Supreme Court, U.S.
FILED
OCT 25 2001
CLERK

Nos. 00-1531 and 00-1711

IN THE
Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

On Writs of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF *AMICUS CURIAE OF THE VIRGINIA STATE CORPORATION COMMISSION*

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For The Fourth Circuit

BRIEF *AMICUS CURIAE*

The interest of the Commission in this proceeding is that of a State agency that, pursuant to State constitutional authority and legislation, has the authority to regulate the telecommunications industry in the Commonwealth of Virginia. The Commission's views are not adequately represented by petitioners, respondents or other parties. It is believed that the views contained herein will provide a more complete view of the Constitutional and statutory issues involved.

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QUESTION PRESENTED IN NOS. 00-1531 & 00-1711

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996?

STATEMENT OF *AMICUS* INTEREST[1]

The Virginia State Corporation Commission is a State administrative body created by the Constitution of

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[1] Rule 37.6 Statement: William H. Chambliss, General Counsel to the Virginia State Corporation Commission, is the author of this brief. No person or entity other than the Virginia State Corporation Commission has made a monetary contribution to the preparation or submission of this brief.

Virginia and charged with, among other things, the regulation of telecommunications entities within the Commonwealth of Virginia. Va. Const., Art. IX Sec. 1, *et seq.* The Va. Commission continues to be involved in the regulation of telecommunications entities and the creation of competitive markets for the benefit of Virginia consumers. The Constitution of Virginia and Virginia state law confer upon the Commission the authority under state law to order interconnection between carriers operating within the Commonwealth and specifically § 56-38, et seq. of the Code of Virginia authorizes the Commission, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." After the passage of the 1996 Act, the Va. Commission became involved in the arbitration and interpretation of interconnection agreements between competitive local exchange companies ("CLECs"), seeking to enter the local telephone market in Virginia and incumbent local exchange companies ("ILECs").

In *GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998), aff'd 199 F.3d 733 (4th Cir. 1999), the Court held that the Commission in arbitrating interconnection agreements pursuant to § 252 of the 1996 Act, waived any claims of sovereign immunity under the Eleventh Amendment. Subsequently, the Va. Commission has declined to waive sovereign immunity under the Eleventh Amendment of the United States because it has not been empowered by either the Constitution of Virginia or the Code of Virginia to do so.[2] Consequently, the Va.

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[2] *Petition of Starpower Communications, LLC, For declaratory judgment and enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc.*, Case No. PUC990156, 2000 S.C.C. Ann. Rep. 272; *Petition of Starpower Communications, LLC, For declaratory judgment interpreting interconnection agreement with GTE South, Inc.*, Case No. PUC990023; and *Petition of Cox Virginia Telecom, Inc. v. GTE*

Commission is no longer able to enforce § 252 of the Act for arbitration since doing so imperils Virginia's sovereign immunity. Nor does the Va. Commission approve negotiated interconnection agreements under the 1996 Act, but instead relies on state law authority.[3] The Virginia State Corporation Commission offers to conduct arbitration of interconnection agreements pursuant only to existing state law authority.[4] At this time all telecommunications entities offered this option by the Va. Commission have declined said offer, and the Federal Communications Commission is presently arbitrating a Virginia case.[5]

As the success of the opening of competitive markets in the telecommunications industry is dependent upon a well-functioning framework of interdependent regulatory entities and the appropriate recognition to the decisions and

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South Incorporated, For enforcement of interconnection agreement for reciprocal compensation for the termination of local calls to Internet Service Providers, Case No. PUC990046, 2000 S.C.C. Ann. Rep. 263.

[3] Therefore, the Virginia State Corporation Commission awaits this Court's decision on the issue of a state commission's waiver of sovereign immunity by participation in actions pursuant to § 252 of the 1996 Act. It is reasonably believed that other state regulatory bodies are similarly positioned, i.e., without express authority to waive the immunity of their particular state.

[4] Virginia SCC Rules codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service" provide for the authority to address interconnection issues under the authority of the Virginia Code. Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for arbitration of contested issues.

[5] *In the matter of Petition of AT&T Communications of Virginia, Inc., For preemption of jurisdiction of the Virginia State Corporation Commission pursuant to § 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-251, DA 01-198, 2001 WL 62694 (F.C.C. January 26, 2001).

authority of the State commissions, the Commission urges this Court to sustain the orders below. The Court of Appeals decision that no waiver of sovereign immunity occurred by State commission participation in the regulation of interconnection agreements is in accord with law and Congressional intent. The Virginia State Corporation Commission supports the position that State commissions must retain the authority to render final orders or decisions which possess full effect and finality under state law. The Court should conclude that neither the 1996 Act nor § 1331 provide a basis for a finding of waiver of sovereign immunity by a state commission fulfilling obligations imposed by the 1996 Act.

SUMMARY OF ARGUMENT

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 251 et seq.) to open the local telecommunications markets to competition.[6] The 1996 Act[7]

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[6] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York, and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee, and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau 1996 WL 164625 (F.C.C. April 10, 1996) at page 3. Particularly, the Virginia General Assembly amended § 56-265.4:4 of the Code of Virginia to provide for competition in local exchange telecommunications in 1995. The Va. Commission enacted rules governing the provision of such services; codified at 20 VAC 5-400-180 as "Rules governing the offering of competitive local exchange telephone service".

[7] *See*, 47 U.S.C. §§ 251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. § 251(a). With regard to ILECs, the duty to interconnect is even more specifically defined by § 251(c)(2). (Cite to this assertion)

In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of § 251.

As a State that has been in the forefront of the development and opening of competitive markets in the telecommunications industry,[8] the Commonwealth of Virginia has an important stake in the protection of the framework and relationship between the telecommunications industry, the State commissions, and Federal courts created under the 1996 Act. Virginia likewise has an equally important stake in maintaining sovereignty over the processes of its state judicial and regulatory bodies. The federal district courts have only that jurisdiction that Congress grants through statute. The federal district courts do not possess subject-matter jurisdiction over suits that

[8] As of June, 2001, 200 competitive local exchange companies (CLECs) have certificated in the Commonwealth of Virginia.

challenge, as contrary to federal laws, orders of state public utility commissions interpreting or enforcing interconnection agreements. Congress has not abrogated the State commission's sovereign immunity pursuant to 28 U.S.C. § 1331.

ARGUMENT

I. Federal Courts Do Not Have General Federal Question Jurisdiction To Determine Whether State Commission Determinations Violate the 1996 Act Under § 1331.

The Fourth Circuit held that 28 U.S.C. § 1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. § 252(e)(6).[9] Furthermore, the Court of Appeals held that "the simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. § 1331."[10] Petitioners contend that the federal district courts have jurisdiction under 28 U.S.C. § 1331.[11] The Va Commission maintains that the case before this Court does not meet the requirements for jurisdiction under 28 U.S.C. § 1331.[12]

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[9] Bell Atlantic Maryland, Inc. v. MCI WorldCom Inc., *et al.*, 240 F.3d 279, 309 (4th Cir. 2001).

[10] Id.. at 308.

[11] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the. . .laws. . .of the United States.

[12] The party seeking the federal forum must establish the basis for the court's jurisdiction. Petitioners have failed to allege that the federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. Seagull Specialty Co.*, 237 U.S. 479, 480 (1915).

The federal district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

Furthermore, § 1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to § 1331. The Supreme Court has expressly held that § 1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that § 1331 constitutes an abrogation of state immunity.

A. There is no private cause of action under the 1996 Act

Even though Congress has conferred general federal question jurisdiction on the federal district courts under 28 U.S.C. § 1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly defined constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has held, "the source of plaintiff's rights must be found. . .in the substantive provisions of the. . .Act which they seek to enforce. . .*Touche Ross & Co. v. Reddington,* 442 U.S. 560, 577 (1979).

Section 1331 should be construed strictly and all doubts should be resolved in favor of State court jurisdiction. *Aetna Inc. Co. v. Chicago RI & PR Co.*, 229 F.2d 584, 586

(10th Cir. 1956). There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowber Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal questions. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921).[13]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir 1996). By now, Congress is well aware of this presumption and how to craft statutes that unequivocally do provide private remedies. *See, Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("*Touche*"). Appellants argument relies upon the erroneous assumption that the existence of a federal statute automatically gives rise to § 1331 jurisdiction.[14]

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose special benefit the statute was passed; and whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the

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[13] Since no state law claims are raised, this second test does not apply.

[14] Petitioners contend in this appeal that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument is obviated by the fact that federal district courts are courts of limited jurisdiction and only possess that jurisdiction granted expressly by Congress.

cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78 (1975) ("*Cort*").

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

The legislative history of the 1996 Act establishes that telecommunications entities were not intended to be special beneficiaries of the statute enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . The result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . Indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748, *reprinted in* U.S.C.C.A.N. (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers generally and was not intended to specially benefit ILECs such as BA-MD.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a general private cause of action. No language in the Act supports such an argument. There are limited express grants of federal jurisdiction in the 1996 Act[15] but, as pertinent here, one such grant is limited[16] to suits brought by parties to interconnection agreements. 47 U.S.C. § 252(e)(6). Under § 252(e)(6), a district court's review of a State Commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§ 251 and 252. Such review is narrowly construed and does not cover other aspects of a State Commission's decision, such as consistency with State law, or matters covered in § 253. *See, Southwestern Bell Telephone,* 225 F.3d 942. Therefore, § 252(e)(6) is a limited jurisdictional provision.

Aside from the narrow remedy contained in § 252(e)(6), the 1996 Act also explicitly provides for federal

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[15] Section 252(e)(6) provides, in pertinent part, in any case in which a State Commission makes a determination under this section, any party injured by such decision may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251.

[16] The district courts have construed § 252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee,* 946 F. Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under § 252(e)(6); only the interconnecting service provider or affected local exchange carriers has standing.)

court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a specific right of access to the federal courts in § 252(e)(6) and the other sections noted above is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered but failed to include a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a general private right of action. S. Rep. No. 23, 104th Cong., 1st Sess., 1995 at 104-05 (March 30, 1995). However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in the three sections of the 1996 Act while deleting a general provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). Nor is there any evidence that Congress anticipated that there would be a private remedy.

This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of

interest. These factors are only of relevance if the first two factors give indication of Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

The conclusion that the 1996 Act does not create a private cause of action negates any claim of federal subject matter jurisdiction.[17] In the absence of a federal statutory cause of action, declaratory relief by a federal court is available only when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any state regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See, also *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

No reasonable argument could be made contending that the 1996 Act entirely preempts state regulation of local exchange service or local exchange carriers. Among a variety of other things, § 252 requires a state commission to determine wholesale rates in the context of an arbitration. *See, e.g.*, §§ 251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters

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[17] This Court held that the Federal Communications Act of 1934 "does not create new private rights". *See Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 14 (1942).

falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. § 1331 and therefore uphold the decision of the Court of Appeals.

II. The *Rooker-Feldman* Doctrine Was Properly Applied By the Fourth Circuit.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman*, the Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. § 1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of state court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§ 1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. § 1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The

second inference is that Congress intended to foreclose all other forms of federal court review of state decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons that underlie the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

The *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. § 1257." *Feldman*, 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

The leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that your *amici*, the Virginia State Corporation Commission, is at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist .... Legislation on the other hand looks

> to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to exist." *Feldman*, 460 U.S. at 479. Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

The Va. Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents, punish for contempt, and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law.[18] This Court has recognized that state agencies perform judicial acts in *FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982). The *Rooker-Feldman* doctrine preserves the autonomy of both sovereigns and prevents undue incursions of federal courts upon lower courts. The Fourth Circuit recognized the judicial nature of state commissions' proceedings and properly found that federalism requires the federal district courts to refrain from taking jurisdiction in cases involving state commissions.

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[18] Code of Virginia § 12.1-13.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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